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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 482

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 538–552) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 117–129, 137–182) are reported at 117 N.L.R.B. 1277.

JURISDICTION

The court below entered its judgment on August 1, 1958 (R. 553). The petition for a writ of certiorari was granted on December 16, 1958 (R. 554). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

A union, certified by the Board, filed a charge alleging that the employer was not bargaining in good

faith. The Board in due course conducted an investigation and issued a complaint alleging that the employer had violated its bargaining obligation. The question presented is whether the Board in formulating its complaint is circumscribed by a requirement that it confine itself to the specific facts recited in the charge, or whether it may place substantial reliance upon events occurring after the filing of the charge which were uncovered during the course of the investigation.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)[1] are as follows:

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) *For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder,*

[1] The provisions printed in italics were added by the Taft-Hartley amendments of 1947; the remaining provisions were in the original Act, 49 Stat. 449.

and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.* Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

STATEMENT

I. THE FINDINGS, CONCLUSIONS, AND ORDER OF THE BOARD

A. THE BARGAINING NEGOTIATIONS

The American Federation of Grain Millers, AFL–CIO, herein called the Union, won a Board-conducted election in June 1953, and became the certified bargaining representative of respondent's employees (R. 148, 190). Thereafter, representatives of the Union and of respondent met in a series of approximately twenty bargaining conferences between August 1953 and November 1954, but failed to reach agreement on a contract (R. 148–153, 227–229). Prior to the commencement of these negotiations and on a number of subsequent occasions, respondent's president instructed his negotiators to bear in mind that "he would not sign a contract" that contained an arbitration clause; that the contract must contain a no-strike clause with a monetary penalty for its breach; and that seniority was not to be the sole governing factor in promotions or layoffs (R. 164, 232–233, 259–260). On one occasion respondent told the Union that the monetary penalty would apply only to strikes authorized by the Union, but respondent later insisted that the penalty apply also to unauthorized strikes (R. 366–368, 374–377).

During the course of the negotiations, the Union made repeated unsuccessful requests for a list of employees in the unit, together with their classifications, wage rates, and dates of employment. These requests were made on August 13, November 12, 1953, and January 29, 1954, before the Union filed a charge with the Board, and on July 2 and October 15, 1954,

after the filing of the charge (R. 148–149, 160, 162, 19, 196, 327–338, 377–380, 426–430, 458–460, 462–464).

In April 1953, during the course of the negotiations, and about one month prior to the filing of the Union's charge, the Company put into effect certain wage adjustments for some of the employees without negotiating with the Union concerning the changes (R. 165, 176–177, 19, 201–203, 247–248). Again in October 1954, while negotiations were in progress but after the filing of the charge, the Company, without notice to or consultation with the Union, instituted a general across-the-board wage increase (R. 119–120, 165, 175, 19, 241–246, 249–254, 259, 478).[2] The Company's action in instituting these wage changes without prior negotiation with the Union on the subject was consistent with the Company's insistence throughout the bargaining sessions (both before and after the filing of the charge) that any contract it signed must provide for the Company's right to raise wages without any negotiation with the Union (R. 156–157, 159, 198–199, 203, 279, 281, 286, 289, 336–339, 397–399, 419–421). Respondent on one occasion disclaimed any desire for power to make wage reductions, but thereafter demanded that the contract authorize it not only to revise wages upward but also to lower them without bargaining with the Union (R. 334–335, 397–399).

During the course of the negotiations the Company repeatedly refused to incorporate certain practices of long-standing into a contract. Thus the Company ad-

[2] The details attending this action are accurately set forth with full record references in the dissenting opinion filed in the court below (R. 552, n. 1).

mitted that for many years it had followed the practice of giving a paid vacation of one week to its employees each year, and of paying slightly higher wages to employees on later shifts, and that it expected to continue these practices, but it refused to contract to do so (R. 320–321, 359–362, 369–371). Similarly, although the Company stated that it had never sought, and did not intend in the future, to avoid payment of overtime by staggering the workweek (i.e., laying off employees during the week and recalling them on Saturday), it refused to incorporate a "no-stagger" clause into any contract (R. 302–303, 368–369, 372–374).

In the course of the bargaining negotiations respondent did make certain "concessions." Thus, respondent agreed to pay overtime for work in excess of 40 hours in any one week as required by law (R. 304–305, 307–308, 198–199, 281); it agreed to refrain from discrimination, restraint, and coercion against any employee because of membership or non-membership in the Union (R. 330–31); it agreed to state in the contract that "we will do our best" to continue giving employees a one week vacation with pay (R. 451); it agreed to give the Union space on the plant bulletin board (R. 346–347); it offered to agree to an arbitration clause providing it could be used only once a year (R. 414–417, 421–423, 432) or in the alternative a clause providing for arbitration where both parties agreed it was necessary (R. 432).[3]

[3] These "concessions" should be compared with the Union's expressed readiness "to modify a great many" of its proposals (R. 526), as exemplified in its agreement to a monetary penalty for breach of a no-strike clause, its willingness to abandon its arbitration proposal, its acceptance of respondent's griev-

The last bargaining session was held on October 15, 1954 (R. 161–162, 455–470). At this meeting, the Union protested the Company's action in granting a wage increase without notice to or consultation with the Union (R. 120, 161, 460–462). Various other subjects were discussed, but by the end of the meeting the parties had still reached no agreement as to whether the contract should contain an arbitration provision, as to whether the contract should contain a no-strike clause, and as to the extent to which seniority should govern promotions and layoffs (R. 161–162, 455–470). In addition, no agreement had been reached as to whether the contract should include commitments by respondent to continue its existing practices with respect to paid vacations, shift differentials, and regularity of working hours (R. 302–303, 320, 368–374). Respondent had also failed to supply the data repeatedly requested by the Union (*supra*, p. 4).

When the parties met again on November 19, 1954, the Company announced that it would no longer recognize the Union as the employees' bargaining representative and that it would not bargain further (R. 121, 162, 206, 472, 475, 478). The Company alleged that it had received "word of mouth" information that the Union no longer represented a majority of the employees (R. 207–209, 294–295, 476).

B. PROCEEDINGS BEFORE THE BOARD

On May 20, 1954, after several months of fruitless bargaining conferences, but prior to the October wage

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ance proposal, and its offer to reduce its vacation request (R. 363, 401–402, 485).

increase unilaterally effected by respondent, the Union filed and served an unfair labor practice charge, alleging that respondent "has engaged in and is engaging in unfair labor practices" in that it refused to bargain collectively and had discharged four employees for union activities (R. 19–23). By letter dated July 13, the Regional Director for the Board's Sixteenth Region advised the Union that he was refusing to issue a complaint, on the ground that "it does not appear that there is sufficient evidence of violation to warrant further proceedings at this time" (R. 138, n. 2; 25). On or about July 31, the Union requested the General Counsel of the Board to review such refusal (R. 138, n. 2; 27). On January 24, 1955, subsequent to the unilateral wage increase of October 1954, and while the request for review was pending, the Regional Director advised the Union that "Upon reconsideration of the facts and circumstances, and additional evidence furnished us in connection with our investigation in the above matter, we have decided to withdraw our refusal to issue Complaint with respect to the 8(a)(5) allegation of refusal to bargain, dated July 13, 1954. We shall proceed with our investigation in due course" (R. 126; 80). On August 12, 1955, the General Counsel informed counsel for the Union as follows (R. 125–126; 82–83):

> With respect to the 8(a)(5) allegation of refusal to bargain, the Regional Director advised the parties by letter dated January 24, 1955, that he was withdrawing his dismissal of the 8(a)(5) portion of the charge and was continuing with the investigation thereof. All further inquiries with respect to the 8(a)(5)

allegation should be addressed to the Regional Director.

On August 17, the Regional Director issued the complaint herein, alleging that "On or about November 21, 1953 [six months prior to the filing of the charge], and at all times thereafter, respondent did refuse and continues to refuse to bargain collectively"; that "On or about October 7, 1954, respondent, without notice to the Union, put into effect a general wage increase"; and that by those acts "Respondent did engage in and is hereby engaging in an unfair labor practice," violative of Section 8(a)(5) of the Act (R. 85–89).

C. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of "all the relevant facts as shown by the record in this case," the Board, in agreement with the Trial Examiner (R. 167–177), found that respondent was not bargaining in good faith with the Union, thereby violating Section 8(a) (5) and (1) of the Act (R. 118–127). The Board observed that the general wage increase given by respondent "while negotiations were still continuing, and in complete disregard of the Union's representative status, provides the final insight into the respondent's conduct of negotiations with the Union" (R. 126). Accordingly, the Board concluded that "after November 21, 1953 * * * respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act" (R. 126).

In so holding, the Board (one member dissenting) held that the bargaining negotiations and the unilateral wage increase which occurred *after* the filing of the charge were properly within the scope of the complaint as the conduct involved was similar and closely related to that involved in the charge (R. 123–125, 134–135).

Accordingly, the Board ordered the Company to cease and desist from refusing to bargain; to refrain from interfering with the Union's efforts to bargain; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 127–129, 136–137).

II. THE HOLDING OF THE COURT BELOW

The court below, with one judge dissenting, set aside the order of the Board (R. 538–549). Judge Cameron, writing the opinion in chief, was of the view that the unilateral wage increase of October 1954 was not properly cognizable by the Board as it occurred after the filing and service of the charge (R. 543–548). In his view "* * * the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge" (R. 543). He also approved the view of the dissenting Board member that "but for the wage increase there would be no case whatever against the respondent" (R. 540, n. 5, see also R. 542–543). Chief Judge Hutcheson, concurring, agreed with Judge Cameron's holding that the unilateral wage increase was not to be taken into account by the Board (R. 548–549). Judge Hutcheson further agreed that, but for the unilateral increase, the record was devoid of any basis

for the Board's finding that respondent had not bargained in good faith (R. 548).

Judge Rives, dissenting, was of the opinion that respondent had been guilty of a refusal to bargain within the six months preceding the charge, and that in any event the unilateral wage increase occurring after the charge was properly considered by the Board (R. 549–552). In his view, the holding of the majority that such post-charge conduct was not cognizable by the Board was "excessively technical and restrictive, and if sustained, * * * will seriously cripple the Board in any effective enforcement of the Act" (R. 551).

SUMMARY OF ARGUMENT

Under this Court's holding in the *National Licorice* case, 309 U.S. 350, 369, the Board was authorized to include in its complaint unfair labor practices "which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." The unilateral wage increases involved in this case fall within that rule, in that they were a further manifestation of the Company's refusal to bargain, which was the gravamen of the charge, and grew out of the Company's insistence during the course of the bargaining negotiations on the freedom to act unilaterally.

The 1947 amendments made no change in the rule of the *Licorice* case. All the considerations underlying that decision apply equally under the amended Act, and Congress evidenced no dissatisfaction with, or intention to change, the *Licorice* rule. The sole stat-

utory change relating to charges was to preclude issuance of a complaint based upon charges filed and served over six months after the occurence of the unfair practices charged, but both the language and the legislative history of this provision show that it was designed to provide a period of limitations governing past violations, and not to alter the rule of the *Licorice* case relating to violations which are "of the same class * * * as those set up in the charge and were continuations of them in pursuance of the same objects." 309 U.S. at 369.

The case should be remanded with instructions to enforce the bargaining order in full. The evidence that respondent was not bargaining in good faith is more than ample to support the Board's finding. The contrary view expressed by the majority of the court below reflects a clear misapplication of the standard of judicial review declared by this Court and generally applied in other circuits.

ARGUMENT

THE BOARD'S COMPLAINT PROPERLY INCLUDED VIOLATIONS COMMITTED AFTER THE FILING OF THE CHARGE

The essence of the decision below is that the Board's complaint "must faithfully reflect the facts constituting the unfair labor practices as presented in the charge." While the court acknowledges that a complaint may enlarge upon the charge to include post-charge activity, it is evident that the permissible area

of enlargement which the court has in mind is the mere "addition of details" which are in line with the general substance of the charge or are merely the "culmination" of the events covered by the charge (R. 545, N. 11, 547). In thus circumscribing the scope of the complaint, the court below, in our view, has failed to follow a controlling decision of this Court construing the statute, and has misconceived the separate functions served by the charge and the complaint.

In *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 357, 367–369, this Court dealt with a question substantially identical to that raised here, namely, "whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that [certain actions by the employer] involved unfair labor practices, since both occurred after the charge was lodged with the Board. * * *" 309 U.S. at 357. In that case the employer argued (Petitioner's brief in No. 272, October Term, 1939, pp. 20–24), precisely as does the court below, that the language of Section 10(b) authorizing the issuance of a complaint "stating the charges in that respect" means that "the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge" (R. 543). This Court, speaking through Mr. Justice Stone, unanimously rejected the contention, stating (309 U.S. at 369):

> It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices *which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.* The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of *the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects.* The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that "the Board was within its power in treating the whole sequence as one." [Emphasis added.]

In the instant case, as in *Licorice,* the post-charge violations (granting of wage increases without prior negotiations over them with the Union) were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." The charge alleged that the Company "has engaged in and is engaging in" an unfair labor

practice in that it "refused to bargain collectively" (R. 20). The unilateral wage increase occurring after the filing of the charge was "of the same class of violations" and a "continuation" thereof in that it grew out of respondent's continued insistence on freedom to act unilaterally (*supra*, p. 5), and constituted a refusal to bargain violative of Section 8(a)(5). *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, 223–225; *May Dept. Stores* v. *National Labor Relations Board*, 326 U.S. 376, 385. As those cases establish, the employer's unlawful action in instituting a unilateral wage increase while negotiations were continuing could serve but to emphasize the claim advanced in the charge that the employer was not approaching the bargaining with the good faith required by the Act. Under the *Licorice* rule, therefore, the Board properly included the post-charge conduct in its complaint.

In confining the Board to the events alleged in the charge, the court below has misconceived the separate functions served by the charge and the complaint, respectively. Under the statute anyone may file a charge. It is not framed by lawyers with an appreciation of the legal significance of the details of conduct. On the contrary, a charge may be filed by laymen, not infrequently semiliterate workers, who may be only dimly aware that in some way their rights are being invaded. The charge "does not even serve the purpose of a pleading" but "merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. To require a charging party to particu-

larize each and every act constituting an unfair labor practice would place upon him the burden and expense of investigating and determining the full nature and scope of the employer's or the union's misconduct. Congress, however, has deliberately placed the latter responsibility upon the Board, a public agency vested by statute with the necessary investigatory machinery. Moreover, to require the details of the unfair labor practices to be specified in the charge would place upon the charging party the responsibility for framing the issues in the case, a matter which Congress left the Board to do in the complaint. *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5); *Consumers Power Company* v. *National Labor Relations Board*, 113 F. 2d 38, 42 (C.A. 6); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415–416 (C.A. 10).

If, as the court below stated, the complaint is to be confined to the exact limits of the claimed violations set forth in the charge, then the failure of the charging party to allege certain violations would preclude their development by the Board, and the statutory machinery would be restricted to a vehicle for the vindication of private, and not public rights. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362, and authorities there cited; see also *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687.

The 1947 amendments to the Act made no change in the rule of the *Licorice* case or with respect to the functions of a charge or complaint. As we have seen,

the statutory language emphasized by the court below in attempted justification of its holding was in the original Act, and was unsuccessfully relied on by the employer in *Licorice*. The only change in the pertinent section (see p. 3, *supra*) was the addition of a proviso that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *." The 1947 amendment accordingly restricted the Board's power to probe events occurring more than six months *prior* to the filing and service of the charge. Both the language of the proviso and its legislative history show that it was designed only to provide a period of limitations governing past violations and to extinguish liability for unfair labor practices committed more than six months prior to the filing of the charge. It did not alter the rule of the *Licorice* case relating to subsequent violations.[4] "The six month limitation refers only to acts that occur before the charge and does not prohibit the inclusion of similar or related acts happening after the charge." *National Labor Relations Board* v. *Kohler Co.*, 220 F. 2d 3, 7–8 (C.A. 7); accord: *National Labor Relations Board* v. *Epstein*, 203 F. 2d 482, 485 (C.A. 3), certiorari denied, 347 U.S. 912, a case which, like that at bar, involved a post-charge unilateral wage increase.

Nothing in the amended Act suggests that Congress intended any drastic departure from the basic concept that the Board, once its jurisdiction is invoked, acts

[4] S. Rept. No. 105, 80th Cong., 1st Sess., p. 26, 1 Legislative History, p. 432; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 53, 1 Leg. Hist. 557; 93 Cong. Rec. 4283.

in the public interest, and, subject to the six months limitations period, its statutory responsibility to protect public rights is not limited by the contentions of the charging private party. On the contrary, the amended Act retains the provisions of the original Act which give the Board broad investigatory power (Section 11). It also retains the provision which permits the Board to amend its complaint at any time (Section 10(b)). The significance of these provisions would be seriously curtailed if the Board were restricted to the precise violations particularized in a charge.

The contention that the amended Act added a requirement that the complaint be limited to conduct detailed in the charge thus attributes to Congress a desire fundamentally to alter the purpose hitherto served by a charge and indeed to alter the whole concept of the Board's role. But the legislative history is devoid of any evidence that Congress intended so drastic an alteration of the function of the charge. On the contrary, the legislative history, replete though it is with reference to judicial decisions Congress was in a "mood" to modify (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 486–487), contains no criticism, indeed no mention, of the *Licorice* case or the rule there laid down, even though Congress in amending the Act expressly dealt with the subject of the charge. Hence, it may fairly be assumed that Congress, apart from intending that prompt notice of a pending investigation be furnished the prospective respondent by service of the charge, did not otherwise change the function of the charge,

as recognized and described by the courts. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365–366; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114–115; *Brewster* v. *Gage*, 280 U.S. 327, 337.

It is urged, however, that one of the basic purposes of the amended Act in providing for the filing and service of charges within six months of the alleged unfair labor practices was to protect against the resurrection of stale charges long after the commission of the alleged illegal acts when relevant evidence and records might no longer be available to the alleged wrongdoer. This objective, the argument runs, is frustrated if the Board can enlarge upon the charge so as to include in a complaint, as here, matters occurring after the charge and 11 months prior to the issuance of the complaint. The argument overlooks the premise of the Board's position, namely that the complaint in enlarging upon the charge would be confined to such additional unfair labor practices as are related to, or grow out of, those alleged in the charge while the proceeding is pending before the Board. The charge would thus serve as notice to the alleged wrongdoer that his conduct with respect to the alleged unfair labor practices and related activity is under investigation by the Board. In this context the argument of stale charges and loss of evidentiary material loses most, if not all, its force. This is particularly true in the instant case. The charge filed here invoked the Board's investigatory powers with respect to respondent's negotiations and bargaining relationship with the Union. This rela-

tionship was a continuing one and covered the period both before and after the charges. It would be wholly artificial and out of keeping with the purpose of the statute to limit the Board's investigation to that segment of this continuing course of negotiations which took place before the filing of the charge. And by the same token, respondent could hardly have assumed with reason that the investigation would not extend to the entire course of negotiations with the Union.

As the dissenting judge in the court below correctly observed, the effect of that court's holding is to "seriously cripple the Board in any effective enforcement of the Act" (R. 551). In some cases, to be sure, the problem here presented can be averted by the timely filing of additional or amended charges. In many instances, however, this solution is impractical and administratively undesirable. Under the holding of the court below, each new bargaining conference, each new unlawful statement violative of Section 8(a)(1), or each picketing of a new neutral employer violative of Section 8(b)(4), must be followed by a new or amended charge, placing an unnecessary burden both on parties whose rights have been invaded and on the Board's administrative machinery designed to vindicate those rights. Moreover, the new matter contained in the charge may be uncovered by the Board in the course of its investigation, and the charging party may be unaware of it or of its legal significance. Once the Board has been apprised by a charge that a situation exists which warrants investigation and threatens industrial peace, the development of the

case in is the hands of the Board, and not of private litigants, *Kansas Milling Co.* v. *Nationcl Labor Relations Board,* 185 F. 2d 413, 415 (C.A. 10). It is evident from the foregoing that there is no basis for the fears expressed by the court below that the position espoused here would "[leave] the Board and its agent *carte blanche* to expand the charge as they might please, or to ignore it altogether" (R. 544). As this Court has made clear, the Board would be confined in its complaint to the unfair labor practices set forth in a timely charge and those "which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board" (*National Licorice, supra,* 309 U.S. at 369).

This view of the statute is reflected in the holding of the Second Circuit, under the amended Act, that the Board must be given "wide leeway for prosecuting offenses unearthed by its investigating machinery, set in motion by the original charge,"[5] in the recognition by the Third and First Circuits that

> it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations,[6]

and in the observation of the Seventh Circuit[7] that "it

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[5] *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 721 (C.A. 2), affirmed, 347 U.S. 17.

[6] *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C.A. 3); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 15–16 (C.A. 1).

[7] *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149.

is without significance that the complaint was broader than the original charge."[8]

Assuming that the Court finds that the decision below must be reversed, the question arises whether the appropriate disposition is to remand the case for further proceedings, or with instructions to enforce the Board's order. For the reasons indicated below, we submit that, in the circumstances of this case, the latter course should be followed.[9]

A majority of the court below (Hutcheson and Cameron, JJ.) has already indicated that, apart from the post-charge unilateral wage increase, it would set aside the Board's order as unsupported by the record. See opinion-in-chief, R. 540 (n. 5); concurring opinion, R. 548. The dissenting member of the court

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[8] Contrary to respondent's contention in its Brief in Opposition, pp. 16–18, the complaint here was properly authorized. The Regional Director's dismissal of the charge on July 13, 1954, was promptly appealed to the General Counsel. While the appeal was pending, the Regional Director advised the Union that he was reconsidering his dismissal of the charge on the bargaining issue and would proceed to investigate it further. Thereafter, on August 12, 1955, the General Counsel advised the Union that the bargaining charge was being investigated by the Regional Director, and the complaint issued five days later. Under these circumstances, even assuming *arguendo* that the Regional Director could not act while the matter was under review by the General Counsel, the review had been completed and the General Counsel had exercised his power to "direct the Regional Director to take further action" at the time the complaint issued. See 29 CFR, Sec. 101.6, 1949 Ed.

[9] The Board's view as to the proper disposition of the case was also expressly stated in the petition for certiorari, p. 17, n. 6.

below (Rives, J.) was sharply of the other view, stating that "Without reference to subsequent events" the record of pre-charge conduct "furnishes substantial evidence to support the Board's finding that respondent refused to bargain in good faith" (R. 550). The issue thus posed as to the sufficiency of the Board's finding may properly be decided now by this Court. To remand the case with this issue unresolved would only delay further its ultimate disposition, and might well result in this Court's being asked to consider this case a second time.

The dissenting judge in the court below declared that "it is not even debatable that the Board's finding" of bad faith bargaining is supported by the record, and that "The proof, indeed, goes beyond any reasonable doubt" (R. 552). This unusually strong language reflects a strong record. Aside from the unilateral wage increase, the record shows that the employer (1) severely circumscribed the authority of his negotiators, and hence refused to bargain at all over bargainable matters;[10] (2) insisted on both a no-strike clause and the omission of any provision for arbitration;[11] (3) repeatedly refused to embody in an

[10] Cf. *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 185 (C.A. 4), certiorari denied, 317 U.S. 652; *Wheatland Electric Coop. Inc.* v. *National Labor Relations Board*, 208 F. 2d 878, 880, 882 (C.A. 10), certiorari denied, 347 U.S. 966.

[11] Cf. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455; see also *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 282–283; *Local 1111* v. *Allen-Bradley Co.*, 255 Wis. 613, 617, 39 N.W. 2d 740, 742; *Boeing Airplane Co.* v. *Aeronautical Industrial Dist.*, 91 F. Supp. 596, 608 (W.D. Wash.), affirmed, 188 F. 2d 356 (C.A. 9), certiorari denied, 342

agreement existing practices of long standing;[11] (4) refused to make any binding agreement as to wage rates but insisted on freedom of unilateral action;[12] (5) reversed its own position during the course of the conferences to espouse proposals more stringent than those it had hitherto urged (*supra*, pp. 4, 5);[14] (6) refused to agree to any proposal for selecting a neutral arbitrator, insisted on the Union's being liable even for strikes it had not authorized, and repeatedly refused to furnish relevant data requested by the Union (Cf. *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9)). We respectfully submit that on this record the Board's finding of bad faith is amply supported, and that the holding below to the contrary reflects a "gross misapplication" of the standard of review laid down in *Universal Camera Corp.* v. *Na-*

U.S. 821. As the arbitrator for the Ford Motor Company has stated (6 Labor Arbitration Reports 799, 801–802), "the whole purpose of a grievance procedure with a terminable step of arbitration is to substitute that method of adjustment for strikes, lockouts, and similar measures of self-help."

[11] Cf. *National Labor Relations Board* v. *Express Pub. Co.*, 111 F. 2d 588, 589 (C.A. 5), reversed on other grounds, 312 U.S. 426; *National Labor Relations Board* v. *Knoxville Pub. Co.*, 124 F. 2d 875, 883 (C.A. 6); *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C.A. 5).

[12] Cf. *National Labor Relations Board* v. *Berkley Machine Works & Foundry Co.*, 189 F. 2d 904, 907 (C.A. 4).

[14] *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. 2d 843, 845–846, 848 (C.A. 6), affirmed, 311 U.S. 514; *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 35 (C.A. 3); *Inland Lime & Stone Co.* v. *National Labor Relations Board*, 119 F. 2d 20 (C.A. 7); *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 705 (C.A. 4), certiorari denied, 340 U.S. 811.

tional Labor Relations Board, 340 U.S. 474, 490–491.[15] See the majority and dissenting opinion in *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 153–154, 155 and compare the standard of review adopted by the court below in this and other cases[16] with the standard enunciated by the First Circuit in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134, certiorari denied, 346 U.S. 887, and followed by other circuits.[17]

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[15] The Board's experience with the rule of review there laid down is reported in Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A. Journal (October 1958) 945, esp. at 948.

[16] *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F. 2d 634, 639; *White* v. *National Labor Relations Board*, 255 F. 2d 564, 570–574.

[17] *National Labor Relations Board* v. *Century Cement Mfg. Co.*, 208 F. 2d 84, 85–86 (C.A. 2) and *Wheatland Electric Coop.* v. *National Labor Relations Board*, 208 F. 2d 878, 882 (C.A. 10).

CONCLUSION

For the reasons stated above the decision of the court below should be reversed, and the cause remanded with directions to enter an enforcement decree.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
FREDERICK U. REEL,
Attorney,
National Labor Relations Board.

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